

**OPINION
45-294**

May 1, 1945 (OPINION)

USE TAX

RE: Property Subject to

Re: Use Tax on Property "Not Readily Obtainable in North Dakota."

Chap. 241 S.L. 1939 - Chap. 57-4001-4003 R.C. 1943

You have submitted to me letters from W.S. Nott Company of April 13, and April 27, 1945, re use tax on wire rope.

The correspondence does not show which North Dakota firm is involved. It simply states that one of the company's North Dakota customers has refused to pay use tax on wire rope, stating that "this is exempt due to the fact that this material is not warehoused in North Dakota." I take it that the meaning of the quoted phrase is that the property is not ordinarily kept in storage in North Dakota for sale.

Of course our use tax law was enacted to make property purchased outside of the state pay the same tax that this property would have paid had it been bought within the state by a local dealer. The only possible provision in the law, of which I am aware, and which would make this wire rope purchased outside of the state not subject to the use tax, is subdivision (c) of subdivision 1 of section 1 of chapter 241 of the Laws of 1939. This is only inferential in this section, which defines property used in processing as "(c) industrial materials and equipment, which are not readily obtainable in North Dakota, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail."

I do not believe that the specific exemptions specified in section 3 of this Act are broad enough to exempt this wire rope. Subdivision 8 of section 3 exempts from the use tax "industrial materials and supplies which are directly used or consumed in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail." This subsection, it seems to me, is not intended to exempt from the use tax, machinery or parts thereof used in manufacturing processes. In other words, the "or" in the phrase "which are directly used or consumed," is used as a conjunction which would limit the exemption to materials which are consumed or used up directly in the manufacturing process, though they may not enter actually into the finished product. In other words, subdivision 7 of section 3 provides that personal property "which tangible personal property becomes an ingredient or component part of the product or service," is exempt. It is my opinion that subsection 8 complements this and is intended to cover products which are actually consumed in the manufacturing process, although the

material does not actually become a part of the ultimate product. This brings us back to the meaning of the phrase "not readily obtainable in North Dakota." This office has heretofore passed upon the meaning of this phrase. This was an opinion of the attorney general's department to the North Dakota Hospital Association on March 11, 1941. This opinion was based upon the opinion of the South Dakota Circuit Court in the case of Scobell v. Bottum, decided in January 1941. In that case the theater proprietor had purchased seats and other equipment for his theater in Omaha. The South Dakota statute exempted from the use tax property bought without the state as follows: "Tangible personal property not readily obtainable in South Dakota, which is to become a capital asset of any trade, business or profession." The decision in this case was based squarely upon the case of Continental Supply Company v. People, 54 Wyo. 185, 88 P.2d 488. The Wyoming statute uses the phrase "promptly purchasable," which, in my opinion, is the equivalent of "readily obtainable." In that case, the Wyoming court held that the exemption of the Wyoming statute did not exempt from the tax oil well supplies ordered by corporate retailer authorized to transact business in Wyoming, from its home office in another state and by that office from dealers and manufacturers in other states and sent to Wyoming purchasers.

In the course of its opinion, the Wyoming court said:

If a man can go into a store in this state, pay or agree to pay the purchase price, and then and there obtain the goods as counsel say, then the purchaser must pay a sales tax. There is then no room for a use tax. The use tax was intended to supplement or complement the sales tax. That aim of the law is of primary importance in construing the language of the subdivision under consideration. The use tax necessarily applies only to merchandise not already in the state, but brought into it directly or on order. It necessarily, insofar as retailers in this state are concerned, applies only to situations such as, or similar to those which, are presented in the case before us. Hence the term "promptly purchasable" must be construed in that light, and there can be no reason for exempting property from the tax when the order is filled in the ordinary course of trade of that character, as seems to have been true in this case."

In a later case in Wyoming, the court followed the case just quoted from. This case is the case of Manning & Martin, Inc. v. State Board of Equalization, 38 Wyoming 425, 133 P.2d 373. The syllabus reads as follows:

Where machinery and equipment bought by Wyoming mining corporation outside state and used within state for mining was not generally stocked in state for sale at time they were purchased but were at the time of their purchase promptly purchasable in state, through a regularly established agency, the property was not exempt from use tax under statute exempting machinery and equipment used in mining when such machinery and equipment are not generally stocked in state for sale 'or' are not promptly

purchasable in state from a regularly established agency, since the quoted word 'or' is used in a conjunctive sense or in the sense of 'nor'."

In this latter case, machinery and equipment bought outside the state to be used and which were actually used in the state were held subject to the use tax.

If it can be shown that there is no dealer in the state through whom this wire rope could be purchased, then it might possible be said that the wire rope could not be readily obtainable in North Dakota.

Until this can be shown, it is my opinion that the wire rope mentioned is subject to use tax in this state. Further, under the law as it stands at present, the seller, even though he is not a resident of this state, must collect and remit to you the use tax upon this wire rope. In general, property purchased outside the state, either through a resident retailer or on direct order by the purchaser must pay the use tax if the same property purchased from and immediately delivered from stock in the state by, the retailer would be subject to a sales tax. Industrial materials and equipment used directly in processing other personal property which is to be sold ultimately at retail and then subjected to a sales tax is 'readily obtainable' or 'obtainable readily' within this state, if it can be ordered through a resident dealer in material or equipment of like general nature.

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